BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL BERSCHEIDT	)	
Claimant	)	
VS.	)	
	)	Docket No. 5,014,634
WALMART WAREHOUSE #6035	)	
Respondent	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the January 12, 2012 Post Medical Award by Administrative Law Judge Kenneth J. Hursh.

APPEARANCES

The claimant, Michael Berscheidt, appeared pro se. The respondent, Walmart Warehouse #6035, and its insurance carrier, American Home Assurance Company, appeared by their attorney, Michael Kauphusman of Overland Park, Kansas. Due to a conflict, Board Member Gary R. Terrill, has recused himself from this appeal. Accordingly, Joseph Seiwert has been appointed as Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Post Medical Award.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for post-award medical benefits, having found claimant failed to prove, by a preponderance of the credible evidence that the requested medical treatment for his low back pain beginning on July 4, 2010 is necessary to cure and relieve the effects of his September 2, 2004 work injury.

The claimant requests review of this decision arguing that he was not given the opportunity to present his claim and contends that he can provide evidence that his current medical condition started with his injury in 2004 while working for respondent. Therefore, claimant argues the ALJ's decision should be reversed and the matter remanded to the ALJ and the record reopened allowing clamant the opportunity to provide additional evidence as to his medical condition and how it relates to his employment with respondent.

Respondent argues that the ALJ's decision should be affirmed as claimant provided no evidence to support any causal connection between his current back complaints and the original September 2, 2004, workplace injury. Respondent further argues that any medical treatment received by claimant constituted unauthorized medical treatment and, if claimant is entitled to said treatment, respondent's responsibility should be limited by K.S.A. 44-510h to a maximum of $500.00. Respondent also argues that because claimant did not file a brief in support of his appeal he should be forestalled from providing any additional support for his requests.

FINDINGS OF FACT

Claimant drove a truck for respondent transporting freight to and from stores, back hauls and vendors back to the warehouse. In 2004, claimant suffered injury to his back. He filed a claim against respondent, which settled on June 20, 2005 on a running award for a 5 percent permanent partial whole body impairment. Claimant's employment with respondent was terminated on July 30, 2009. At the time of the original injury claimant weighed between 540 and 550 pounds. Dr. MacMillan's report of May 12, 2005, attached to the transcript of the June 20, 2005, Settlement Hearing discussed the inability to properly diagnose claimant with MRI's, CT scans or even plain x-rays due to claimant's weight. In 2007, claimant underwent gastric bypass, resulting in a loss of 250 pounds.

On July 14, 2010, claimant was mowing his backyard and his back "went out"[1] and he fell to the ground. Claimant went to the emergency room and was admitted to the hospital for 3 or 4 days. Claimant ultimately underwent surgery with Dr. Charles Striebinger including a laminectomy on his back on September 20, 2010 and later a fusion on March 7, 2011, all paid for under his wife's insurance coverage. There is no indication whether claimant received ongoing medical treatment between the time of the settlement and the subsequent accident at home.

Claimant filed a post-award medical application on September 22, 2011, requesting medical treatment he was never provided after the accident on September 2, 2004. He claims his current back issues are related to his work injury in 2004 and therefore he should be provided with additional medical treatment.

---

[1] P.H. Trans. at 8.

At the Post-Award hearing on November 9, 2011, the ALJ advised claimant that he could hire an attorney to assist him in the litigation. The ALJ advised claimant that it was his burden to prove the need for the medical treatment was the result of the original injury on September 2, 2004. Claimant was advised that he needed to provide expert testimony "like a doctor"[2] on his own behalf. Terminal dates were set and the hearing ended. No medical reports or testimony were provided for the court's consideration prior to the end of the party's terminal dates. Claimant delivered to the ALJ certain medical reports and records subsequent to the hearing. Those records and reports were attached to his letter hand delivered and stamped received on December 8, 2011, and included the transcript of Settlement Hearing from June 20, 2005, with attachments, a December 7, 2011 letter from David Edalati, M.D., billing statements and discharge instructions from the Shawnee Mission Medical Center and an MRI report from the Shawnee Mission Open MRI Center. The letter does not show a copy being provided to respondent.

The ALJ then forwarded a copy of claimant's letter and the offered documents to respondent by letter of December 9, 2011. The ALJ noted that the settlement transcript along with the attachments were already included in the administrative file of the Division. However, the medical records and billing statements were held to be not admissible without the supporting testimony of the authoring physician. In a letter to the ALJ dated December 15, 2011, those records were objected to by respondent based upon hearsay and lack of foundation. Both the letter from the ALJ and the response from respondent were copied to the claimant. The ALJ, in the Post Medical Award, sustained respondent's objection, citing K.S.A. 44-510k and K.S.A. 44-519.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

[2] P.H. Trans. at 17.

[3] K.S.A. 44-501 and K.S.A. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

K.S.A. 2010 Supp. 44-510k(a) states:

> At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.[7]

K.S.A. 44-523(a)(b)(c) states:

> (a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

---

[5] K.S.A. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] But see *Siler v. Shawnee Mission School District, U.S.D. 512,* 45 Kan. App. 2d 586, 251 P.3d 92 (2011).

> (b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:
>
> (1) If the employee is being paid temporary or permanent total disability compensation;
>
> (2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or
>
> (3) on application for good cause shown.
>
> (c) When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. The administrative law judge shall not stay a decision due to the absence of a submission letter. When the award is not entered in 30 days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director or to a special administrative law judge who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within 30 days following submission by the party and assign it to an assistant director or to a special administrative law judge for immediate decision based on the evidence in the record.

K.S.A. 44-519 states:

> Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

As noted above, it is claimant's burden to prove his entitlement to medical treatment under K.S.A. 44-510k. During this post-award proceeding claimant failed to introduce any medical exhibits or testimony in support of his position. The proffered medical records and reports were inadmissable absent supporting testimony. Claimant failed to lay a proper

foundation for the admissibility of those records. The rejection of those records by the ALJ was proper.

This record also fails to indicate whether claimant obtained or even requested medical treatment between the time of the settlement and the injury in his yard on July 4, 2010. Claimant's wife discussed claimant's being administered several epidural injections. But it is unclear whether those injections occurred at the time of the original injury and treatment or at some other time.

Claimant returned to his regular job with respondent in 2005, as a truck driver. He continued working until his termination on July 30, 2009. The need for medical care did not arise until claimant experienced severe back pain while mowing his lawn in his own yard. Both surgeries appear to have stemmed from that non-work incident.

The Board acknowledges that a claimant's testimony alone is sufficient evidence of a claimant's physical condition.[8] However, at the time of the post-award hearing claimant provided neither testimony regarding the original injury in 2004, nor any indication of back symptoms leading up to the injury in his back yard. No testimony connecting his request for medical treatment to the September 2, 2004 accident was provided at the hearing. Claimant's request that the record be re-opened is also denied. Claimant was provided ample opportunity to provide support for his position but failed to do so.

The ALJ found that claimant failed to prove by a preponderance of the evidence that his need for medical treatment after the July 4, 2010 injury was related to the original September 2, 2004 accident. Instead, claimant's testimony tended to prove that the most recent surgeries were due to a separate and distinct non-work related back injury. After considering the testimony provided and the total lack of medical evidence in this record, the Board agrees.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that his need for medical treatment after the July 4, 2010 incident in his yard was related to his original injury on September 2, 2004. Respondent's objection to the records offered by claimant was properly sustained by the ALJ as no proper foundation identifying those records and medical reports was provided.

[8] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Medical Award of Administrative Law Judge Kenneth J. Hursh dated January 12, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Michael Berscheidt, Pro Se Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge